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UNCITRAL AND INTERNATIONAL COMMERCIAL MEDIATION IN CHINA

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I INTRODUCTION

In less than four years and after only four sessions, the Working Group on Arbitration and Conciliation came up with the UNCITRAL Model Law on International Commercial Conciliation of 2002 (the 'Model Law'), relying primarily on the Conciliation Rules of 1980 (the 'Conciliation Rules'). The Model Law is the first of its kind to encourage the use of conciliation as a dispute settlement method for cross-border commercial transactions. It provides uniform rules for some procedural aspects of conciliation, with a view to enhancing predictability and certainty in the use of the process. It applies to a wide range of international commercial disputes. Such disputes may arise from any legal relationships of a commercial nature, whether contractual or not.¹ They satisfy the requirement of internationality if the parties of a conciliation agreement have their places of business in different States at the conclusion of that agreement. In addition, it happens when the State, in which either a substantial part of the obligations of the commercial relationship is to be performed, or with which the subject matter of the dispute is most closely connected differs from the State in which the parties have their places of business.² Furthermore, 'conciliation' does not merely refer to a directive, advisory form of mediation. It is an umbrella term for all procedures in which a third party assists the parties to settle a dispute

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1 Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, A/RES/57/18 (2002) at art 1(1).

2 At art 1(4).

without imposing a binding decision, including mediation, neutral evaluation, mini-trial or similar proceedings.³

Rather surprisingly, the Model Law inspired only 14 countries to enact or amend domestic legislation on mediation over the past decade.⁴ Such responses were hardly comparable to those of the UNCITRAL Model Law on International Commercial Arbitration of 1985. Despite the fact that China, Fiji, India, Japan, Mexico, Singapore and Thailand participated in the drafting stage, none of the countries in the Asia-Pacific region have informed the UNCITRAL Secretariat of adopting statutes based on the principles of the Model Law thus far. On the other hand, both domestic and international mediation activities proliferated in this region. Disputants preferred modern sets of mediation rules developed by service providers or themselves instead of the Conciliation Rules. Governments endorsed the use of mediation as an adjunct to litigation and promulgated legislation specific to mediation without explicit reference to the Model Law. The key question, then, is whether the Conciliation Rules and the Model Law become obsolete or remain relevant in the Asia-Pacific context. This chapter identifies major challenges involved in international commercial mediation from the findings of three recent surveys. Focusing on mainland China and its two special administrative regions, it compares and explains the extent to which mediation rules and laws in these jurisdictions address the pressing issues of mediation. It argues that the policies underlying the UNCITRAL texts echo those of the Chinese regulatory and legal framework for international commercial mediation, but the Conciliation Rules and the Model Law face an urgent need for update if they intend to lead their harmonizing role in China.

II CHALLENGES OF INTERNATIONAL COMMERCIAL MEDIATION

Whilst each case turns on its own facts, being transnational in nature adds complexity. An international case typically involves higher monetary value, greater number of participants, and differences in legal system, culture, language and time

3 At art 1(3); United Nations, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, (United Nations Publication Sales No. E.05.V.4, New York 2004), at para 7.

4 Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, above n 1.

zone. The 2011 Fortune 1000 Corporate Counsel Survey,⁵ sponsored by Scheinman Institute on Conflict Resolution of Cornell University, Straus Institute for Dispute Resolution of Pepperdine University and International Institute for Conflict Prevention & Resolution, painted a positive picture of disputants' preference for international commercial mediation. Out of the 368 completed questionnaires from general counsels of 1,000 largest American companies, 38.2 per cent attempted alternative dispute resolution (the 'ADR') in all cases unless litigation was appropriate, up from 27 per cent on the part of the initiating parties and 25.2 per cent on the part of the defending parties in 1997. 0.6 per cent espoused an 'always litigate' posture, down from 11.1 per cent 14 years ago. The existence of an ADR clause in the contract between disputants constituted the most compelling reason for using ADR over litigation, followed by efficiency, cost-effectiveness and parties' control over the process. Mediation prevailed over arbitration as the most popular ADR process for commercial disputes between 2008 and 2010, as the latter generated awards that are hard to appeal, resulted in compromised outcomes, faced reluctance of the opposing party to participate, failed to address non-legal issues and hinged on the perceived competence of the neutrals. As high as 86.2 per cent of the respondents indicated a strong likelihood of taking part in mediation in the future.

More recently, the 2013 Survey on Corporate Choices in International Arbitration,⁶ administered by School of International Arbitration of Queen Mary University of London with funding from PricewaterhouseCoopers, echoed. Based on 101 completed questionnaires from in-house counsels worldwide and 30 in-depth interviews from selected respondents, mediation ranked third as the most preferred dispute resolution mechanism for cross-border disputes, following arbitration and litigation. However, a crucial caveat in this key finding was that direct negotiation or mediation settled 57 per cent of the transnational disputes, leaving about 32 per cent of the unsettled cases to proceed to arbitration or litigation. Respondents considered maintenance of ongoing business relationship as the most valued benefit of mediation. Whilst arbitration could achieve fairness

5 Thomas J Stipanowich and J Ryan Lamare "Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations" (2014) 19 Harvard Negotiation Law Review 1.

6 PricewaterhouseCoopers, "Corporate Choices in International Arbitration: Industry Perspectives", <www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

between the parties, the process continued to be hampered by huge costs and substantial delays.

It is also worth noting that positive attitudes towards mediation spread in the Asia-Pacific. The 2013 Survey on the Use of Mediation in the Asia Pacific Region,⁷ conducted by International Institute for Conflict Prevention & Resolution with a General Electric Foundation grant, revealed that there was a slight preference for mediation over arbitration. 78 per cent of 122 respondents from corporations and law firms used mediation in the past three years. The major reasons for choosing this process overlapped partially with those identified in the 2011 Fortune 1000 survey: cost-effectiveness, efficiency and flexibility. The survey also suggested the downside of the process: lack of a final and binding decision, non-binding process, unpredictable and unenforceable outcomes and sign of weakness.

These empirical data pointed out that preserving relationships was the key motivation for planning for and engaging in international commercial mediation. Yet disputants encountered obstacles at each stage of the process. Firstly, there are limited sources for nomination of the neutral role. Most ADR clauses do not name a particular individual to be the mediator. Accurate and publicly accessible information about the experience of practitioners remains scarce. Therefore, most disputants relied upon their own previous experience or recommendations from well-established ADR service providers to select the right candidate.⁸ Secondly, disputants' expectations on the quality of mediators are at the high end of the scale. They insist upon experienced mediators, yet decry the lack of diversity within the international pool. Although many of them controlled the selection of mediators, they expressed reservation about the perceived performance of the appointees.⁹ Thirdly, lingering concerns about the integrity of the process subsist. Largely they reiterate existing problems of unreasonable refusal to mediate, the lack of suspension of the limitation period for initiating court proceedings, the scope of confidentiality of information exchanged during mediation and the absence of enforcement mechanism for mediated settlements. Lastly, the practicing style of mediation is gloriously diverse. Mediators with background as lawyers or judges, who dominate the industry, did not conduct mediation based on a purely facilitative

7 International Institute for Conflict Prevention & Resolution, "Attitudes Toward ADR in the Asia-Pacific Region: A CPR Survey", <www.cpradr.org/Portals/0/Asia-Pacific%20Survey.pdf>.

8 Thomas J. Stipanowich and J Ryan Lamare, above n 5 at Table Q.

9 Thomas J. Stipanowich and J Ryan Lamare, above n 5, at Table T.

model. They proffered evaluations of the factual and legal issues in the dispute, which had a direct bearing on the rate and scope of settlement.¹⁰

III THE CHINESE RESPONSE

Disputants are free to develop their own process rules in a comprehensive mediation agreement to resolve most of the above issues. Alternatively, some relied upon the updated, tried-and-true mediation rules of global service providers, such as the International Chamber of Commerce (the 'ICC'), International Centre for Dispute Resolution (the 'ICDR') and World Intellectual Property Organization (the 'WIPO').¹¹ In China, regionally based institutions played a substantial role in the landscape of international commercial mediation. The mediation rules of the China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Center (the 'CCPIT/CCOIC Mediation Center'), Hong Kong International Arbitration Centre (the 'HKIAC') and China Chamber of International Commerce-World Trade Center Macau Conciliation Centre (the 'CCOIC-WTCM Conciliation Center')¹² represent the dominant procedures in the mainland, Hong Kong and Macao respectively. The conduct of international commercial mediation is further subject to domestic legislation. Hong Kong is the only place in China that has a uniform law of mediation.¹³ The mainland adopts a piecemeal approach to mediation law. Separate statutes govern judicial,¹⁴ community,¹⁵ administrative¹⁶ and labor¹⁷ mediations. None applies solely to

10 Thomas J. Stipanowich and J Ryan Lamare, above n 5, at 62.

11 International Chamber of Commerce Mediation Rules 2014 (the 'ICC Mediation Rules'); International Centre for Dispute Resolution International Mediation Rules 2014 (the 'ICDR International Mediation Rules'); World Intellectual Property Organization Mediation Rules 2014 (the 'WIPO Mediation Rules').

12 China Council for the Promotion of International Trade/China Chamber of International Commerce Mediation Center Mediation Rules 2005; Hong Kong International Arbitration Centre Mediation Rules 1999; China Chamber of International Commerce-World Trade Center Macau Conciliation Centre Conciliation Services Rules 2003.

13 CAP 620 Mediation Ordinance 2013 (Hong Kong).

14 Civil Procedure Law 2013 (People's Republic of China), ch 8.

15 People's Mediation Law 2011 (People's Republic of China); Regulation on the Organization of the People's Mediation Committees 1989 (People's Republic of China); Some Provisions Concerning the Work of the People's Mediation 2002 (People's Republic of China).

commercial mediation, but the Civil Procedure Law becomes relevant if parties to a commercial dispute initiate court proceedings. Macao has not yet enacted any. These rules and laws do not restrict their applicability to local cases. Nor do they contain any provision that in principle would be unsuitable for international cases. A thematic analysis of the Chinese mediation rules and laws reveals that they address certain pressing issues of international commercial mediation with some striking similarities and considerable differences, as elaborated in the discussion that follows.

A Commencement of Mediation

The Chinese mediation rules adopt an opt-in procedure for the commencement of mediation. Articles 13 and 14 of the CCPIT/CCOIC Mediation Rules provide that the party requesting mediation should submit a written application to the mediation center, which will forward a copy to the other party. The respondent should confirm its agreement to mediate within 15 days from the date of receiving the request. Articles 9 and 10 of the CCOIC-WTCM Conciliation Services Rules are essentially the same as the mainland counterpart, except the respondent has 30 days to accept mediation. Articles 3 and 4 of the HKIAC Mediation Rules require the initiating party to serve a written notice to both the mediation center and the other party, and the latter has 14 days to reply. The invitation to mediate is deemed rejected if the requesting party receives no reply after the specified time limit has lapsed.¹⁸ In essence, mediation commences only with the consent of all parties, which reflects the principle of voluntary participation.¹⁹

B Appointment of the Mediator

The Chinese mediation rules respect party self-determination in the appointment of the mediator. Articles 13(3), 14, 16, 17(a) and 17(b) of the CCPIT/CCOIC

16 Administrative Litigation Law of the People's Republic of China 2014 (People's Republic of China); Regulation on the Implementation of the Administrative Reconsideration Law of the People's Republic of China 2007 (People's Republic of China).

17 Labor Dispute Mediation and Arbitration Law of the People's Republic of China 2008 (People's Republic of China).

18 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China), art 15; HKIAC Mediation Rules 1999 (Hong Kong), art 4; CCOIC-WTCM Conciliation Services Rules 2003(Macau), art 11.

19 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China) art 4; HKIAC Mediation Rules 1999 (Hong Kong), art 1; CCOIC-WTCM Conciliation Services Rules 2003 (Macau), art 5.

Mediation Rules and articles 9(3), 10 and 12 of the CCOIC-WTCM Conciliation Services Rules require each party, in its written invitation or acceptance of mediation, to appoint one mediator from the center's panel of mediators or authorize the center to do so unless otherwise agreed. The HKIAC Mediation Rules do not prefer co-mediation. Article 3(a) asks the initiating party to nominate a mediator or mediators thought suitable. Article 4 demands the respondent to indicate whether any mediator nominated is acceptable. A critical and practical question is what will happen when disputants cannot agree on the choice of the mediator. The CCPIT/CCOIC Mediation Center and the HKIAC will act as the designating authority if the parties fail to agree on the choice of the mediator(s).²⁰ The CCPIT/CCOIC Mediation Center may even exercise the discretion to appoint a presiding mediator if it believes that would be beneficial to the process.²¹ The CCOIC-WTCM Conciliation Center fails to bridge this gap. It intervenes only if the parties agree to have a sole mediator but cannot decide on whom.²²

A notable exception of party self-determination in choosing mediators appears in judicial mediation in mainland China. Article 94 of the Civil Procedure Law confers power on a single judge or judicial panel to mediate. The appointment of judge-mediators is still within the solid grasp of the judiciary, which manifests the exercise of judicial power in judicial mediation²³ and reflects the traditional respect for persons in authority over professionals. The general prohibition of trial judges to mediate their own cases, unless with the consent of the parties,²⁴ is a significant step to remove the danger of bias, though an increased involvement of professional mediators and mediation service providers²⁵ to co-mediate²⁶ would be much more effective.

20 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China), art 19(b); HKIAC Mediation Rules 1999 (Hong Kong) art 5.

21 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China), arts 17(c) and 19(a).

22 CCOIC-WTCM Conciliation Services Rules 2003 (Macau), art 12.

23 Several Opinions of the Supreme People's Court on Further Implementing the Work Principle of 'Giving Priority to Mediation and Combining Mediation with Judgment' 2010 (People's Republic of China), art 2.

24 Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation 2009 (People's Republic of China), art 16.

25 Civil Procedure Law 2013 (People's Republic of China), art 95.

C Venue of Mediation

The Chinese mediation rules leave it up to the parties to choose the mediation venue. The HKIAC Mediation Rules exhibit the highest degree of party self-determination. Article 24 of the CCPIT/CCOIC Mediation Rules and article 13 of the CCOIC-WTCM Conciliation Services Rules refer to their own premises as an alternative. Article 94 of the mainland's Civil Procedure Law states that generally judicial mediation takes place in the court, unless otherwise agreed by the parties.²⁷

D Principles of Mediation

The Chinese mediation rules and laws are unanimous about the principle of voluntariness. Articles 4 and 28(4) of the CCPIT/CCOIC Mediation Rules, articles 1 and 11(c) of the HKIAC Mediation Rules, articles 5 and 17(3) of the CCOIC-WTCM Conciliation Services Rules and articles 9 and 93 of the mainland's Civil Procedure Law emphasize that disputants participate in and withdraw from the process on their own free will. The principle of self-determination also appears uncontroversial across the board. In addition to the selection of the mediator and mediation venue, disputants make free and informed choices as to outcome. Article 5 of the CCPIT/CCOIC Mediation Rules and article 6 of the CCOIC-WTCM Conciliation Services Rules state that the process relies on the parties to reach their own settlement agreement. Article 1 of the HKIAC Mediation Rules defines mediation as a non-binding dispute resolution process in which a neutral helps the parties to reach a negotiated settlement. Article 96 of the mainland's Civil Procedure Law provides that the parties, reach a mediated settlement on their own free, will and must not be forced to do so. Section 4(1) of Hong Kong's Mediation Ordinance clarifies that the mediator does not adjudicate a dispute or any aspect of it.

E Role of the Mediator

The rules and laws under study are, however, less unanimous about the neutral character of the mediator. Article 10 of the CCPIT/CCOIC Mediation Rules, article 7 of the CCOIC-WTCM Conciliation Services Rules, article 19 of the 2010

26 Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation 2009 (People's Republic of China) art 16.

27 Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation 2009 (People's Republic of China) art 16.

Opinion of mainland China's Supreme People's Court that interprets the Civil Procedure Law²⁸ and sections 2 and 4(1) of Hong Kong's Mediation Ordinance require the mediator to be impartial, whereas article 6 of the HKIAC Mediation Rules focusses on disinterestedness in the outcome of mediation.²⁹ Incidental to the principle of neutrality, article 21 of the CCPIT/CCOIC Mediation Rules and article 6 of the HKIAC Mediation Rules impose a duty on the mediator to disclose, prior to accepting an appointment, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's neutrality. The latter goes on to say that the proposed mediator who has a conflict of interest cannot serve unless with the consent of all parties,³⁰ which is consistent with the principle of self-determination.

Being entrusted by the parties with the conduct of mediation, the mediator has a wide discretion to perform his or her functions. Article 23 of the CCPIT/CCOIC Mediation Rules, articles 7 and 8 of the HKIAC Mediation Rules and articles 14, 18 and 19 of the CCOIC-WTCM Conciliation Services Rules allow the mediator to take appropriate steps to ensure a quality process, such as the use of joint and separate meetings, encouragement of active participation, request for disclosure of information and controlling timeliness of mediation proceedings. However, article 23(g) and (h) of the CCPIT/CCOIC Mediation Rules goes further regarding the mediator's role in reaching a settlement. It permits the mediator to propose the terms of a possible settlement at any stage of the process, whilst the mainland and Hong Kong legislation refer to a less directive approach to mediation, requiring the

28 Several Opinions of the Supreme People's Court on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment" 2010 (People's Republic of China).

29 Working Group on Mediation of the Department of Justice of the Government of the Hong Kong Special Administrative Region, "The Hong Kong Mediation Code" art 9: "The Mediator shall be competent and knowledge in the process of mediation".

30 Working Group on Mediation of the Department of Justice of the Government of the Hong Kong Special Administrative Region, "The Hong Kong Mediation Code", art 2.

mediator to assist the parties to explore and generate options,³¹ and to reality test and draft settlement terms.³²

F Role of the Parties

The Chinese mediation rules promote proactive participation of the parties, which is a corollary of the principle of self-determination. Article 30 of the CCPIT/CCOIC Mediation Rules, article 9 of the HKIAC Mediation Rules and article 20 of the CCOIC-WTCM Conciliation Services Rules encourage disputants to cooperate with the mediator, so that the process will run smoothly and in a timely fashion. As negotiations proceed, the parties make decisions as to process and outcome. It would be practically impossible for the mediator to ensure that they make free and informed choices to reach each decision. Therefore, article 23(e) of the CCPIT/CCOIC Mediation Rules, article 10 of the HKIAC Mediation Rules and article 15 of the CCOIC-WTCM Conciliation Services Rules provide that the parties may be represented or assisted by experts of their choice, and that the mediator can draw the parties' attention to the importance of independent advice or opinion where appropriate. For avoidance of doubt, these mediation rules specify that the parties will bear the fees of the mediator and other professionals incurred in the process.³³

G Confidentiality

The Chinese mediation rules and laws have provisions on certain aspects of confidentiality of mediation communications. As to non-disclosure, article 26 of the CCPIT/CCOIC Mediation Rules states that settlement agreements and statements based on settlement agreements that the mediator prepares at the request of the parties will not be made public except for their implementation or enforcement. Article 19 of the 2009 Opinion of mainland China's Supreme People's Court that interprets the Civil Procedure Law³⁴ imposes a duty on the mediators

31 Mediation Ordinance (Cap 620) (Hong Kong), ss 2, 4(1).

32 Civil Procedure Law 2013 (PRC) art 97; Several Opinions of the Supreme People's Court on Further Implementing the Work Principle of 'Giving Priority to Mediation and Combining Mediation with Judgment' 2010 (People's Republic of China), arts 16, 20.

33 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China), arts 25, 33; HKIAC Mediation Rules 1999 (Hong Kong), art 13; CCOIC-WTCM Conciliation Services Rules 2003(Macau) arts 15, 23.

34 Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation 2009 (PRC).

and administrators of the process not to disclose information relating to the mediation proceedings. Section 8 of Hong Kong's Mediation Ordinance provides that any person must not disclose a mediation communication except with leave of the court. Leave is, however, not required in seven instances: the consent of all parties to the mediation and the mediator is obtained; the content of the mediation communication is public information; the content of the mediation communication is subject to discovery in civil proceedings; the disclosure is necessary to prevent or minimize the danger of injury to a person or of serious harm to the well-being of a person under 18; the disclosure is made for research, evaluation or educational purposes; the disclosure is made for the purpose of seeking legal advice; and the disclosure is made in accordance with a requirement imposed by law.³⁵ The statutory protection for non-disclosure does not extend to mediation agreements and settlement agreements, which fall outside of the broad definition of mediation communication.³⁶

In regard to without prejudice privilege, article 12(i) of the HKIAC Mediation Rules renders inter-party communications made in aid of settlement both immune from disclosure and inadmissible in evidence. Section 9 of Hong Kong's Mediation Ordinance echoes that mediation communications are inadmissible evidence in subsequent proceedings unless with leave of the court. Judges retain a wide discretionary power to grant leave to admit in evidence what was said or done in mediation. They take into account factors including public interest,³⁷ interests of the administration of justice³⁸ and well-established exceptions of the common law without prejudice rule.³⁹ As the without prejudice privilege has no place in the mainland's legal system, article 31 of the CCPIT/CCOIC Mediation Rules merely prevents the use of settlement plans put forward, proposed, admitted or indicated to be acceptable by the parties or the mediator in the course of mediation as grounds for claim or defence in subsequent proceedings. Similarly, article 22 of the CCOIC-WTCM Conciliation Services Rules does not allow the parties to invoke

35 Mediation Ordinance (Cap 620) (Hong Kong) s 8(2).

36 Mediation Ordinance (Cap 620) (HK) s 2.

37 Mediation Ordinance (Cap 620) (HK) s 10(2)(b).

38 Mediation Ordinance (Cap 620) (HK) s 10(2)(b).

39 Mediation Ordinance (Cap 620) (HK) s 10(2)(c). See also A. K. C. Koo, "Confidentiality of Mediation Communications" (30 Civil Justice Quarterly 192, 2011).

any mediation communications as the basis of claim or defence in post-mediation proceedings. Likewise, article 19 of the 2009 Opinion of mainland China's Supreme People's Court requires the parties not to adduce notes of and concessions, promises, views or proposals made in the process as evidence in related court proceedings, unless with all parties' consent, required by law, or for the protection of national, social or public interests or the legitimate rights and interests of a non-party in the court proceedings.

H Enforceability of Settlement Agreement

Among the three jurisdictions, mainland China offers a considerable incentive to mediate. Mediated settlements are not inferior to court judgments. Articles 234 and 236 of the Civil Procedure Law provides that a party to a judicially mediated settlement may apply to the court for enforcement. For parties who reached a settlement at other mediation organizations, the parties may incorporate an arbitration clause in the settlement agreement, to appoint an arbitral tribunal for the specific purpose of issuing an award on agreed terms based on the settlement agreement.⁴⁰ Alternatively, they may make a joint application to the relevant people's court to confirm the validity of the settlement before invoking the enforcement procedure.⁴¹ The application can be made in writing or by parol.⁴² It requires the submission of a mediated settlement and an undertaking to the effect that the parties entered into the agreement voluntarily without malicious collusion or circumvention of the law and that the parties agreed to bear civil liabilities and other legal liabilities if the content of the agreement results in personal injuries.⁴³ The court will adopt a summary procedure to inquire about the parties' understanding of the content of the mediated settlement, their willingness to accept the respective contractual rights and duties, and their willingness to submit the agreement to the jurisdiction of the court for the purpose of enforcement.⁴⁴ It will assess the mediated settlement and will not declare it valid if any of the following situations applies: a mandatory provision of the law or administrative regulation is

40 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China), art 27.

41 Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation 2009 (People's Republic of China), arts 20-22.

42 At art 22.

43 At art 22.

44 At art 23.

violated; the national, social or public interests are infringed; the legitimate rights and interests of a non-party are harmed; the criminal liability of a party is involved; the terms of the mediated settlement are uncertain; the mediation organization or the mediator compelled parties to mediate or committed a serious breach of professional conduct; or other circumstances that the court thinks fit.⁴⁵ In addition, the court will not validate the mediated settlement if it was made contrary to the intention of the parties, where conflict of interests arose in the mediation or where the mediation process was obviously unfair, unless the parties insist on validation with notice.⁴⁶ The decision to confirm the validity of a mediated settlement is enforceable upon service on the parties.⁴⁷

I Role of the Mediator in Subsequent Proceedings

The Chinese mediation rules and laws are rather inconsistent as to the role of the mediator in subsequent proceedings. Article 21 of the CCOIC-WTCM Conciliation Services Rules allow the mediator to act as an arbitrator in case of an unsuccessful mediation. In an effort to uphold impartiality and maintain confidentiality of mediation communications, the mainland and Hong Kong counterparts go in the opposite direction. Article 29 of the CCPIT/CCOIC Mediation Rules states that the mediator will not act as an arbitrator if mediation fails. Article 14 of the HKIAC Mediation Rules requires an undertaking from the parties not to appoint the mediator as an adjudicator, arbitrator or representative, counsel or expert witness of any party in any subsequent adjudication, arbitration or judicial proceedings whether arising out of the mediation or any other dispute in connection with the same contract. Further, article 32 of the CCPIT/CCOIC Mediation Rules, article 14 of the HKIAC Mediation Rules and article 19 of the 2009 Opinion of mainland China's Supreme People's Court provide that the mediator will not act as a witness in subsequent proceedings.

IV INFLUENCE OF THE UNCITRAL TEXTS

The above thematic analysis shows that the Chinese mediation rules and laws are largely the same in terms of commencement, voluntariness, self-determination as to process and outcome and responsibilities of the parties. These similarities support the unformulated policy consideration of keeping the parties' freedom of

45 At art 24.

46 At art 24.

47 At art 25.

action intact at any stage of the process. Another policy consideration is to recognize and maintain the need for flexibility, which inadvertently leads to considerable differences in default appointment of the mediator, the role of the mediator, confidentiality of mediation communications, as well as enforcement of settlement agreement. Such regional resemblances and disparities call for modernization and harmonization, to reflect contemporary practice, reduce costs and efforts in modification when adopting the mediation rules in a dispute⁴⁸ and position China as a favorable forum for international commercial mediation as a whole. As the policies underlying the Chinese mediation rules echo similar stances taken at the UNCITRAL and global mediation service providers,⁴⁹ the Conciliation Rules and the Model Law have a potential for inspiring modernization and harmonization of international commercial mediation in the Chinese context, if the Working Group on Arbitration and Conciliation improves on areas that are long overdue, as highlighted in Table 1 and 2 and discussed below.

48 CCPIT/CCOIC Mediation Rules 2005 (People's Republic of China), art 3; HKIAC Mediation Rules 1999 (Hong Kong), art 2.

49 *Report of the Secretary-General: commentary on the revised draft of UNCITRAL Conciliation Rules*, A/CN.9/180 (y 1980), at paras 14-17; United Nations, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, (United Nations Publication Sales No. E.05.V.4, New York 2004) at para 7, 9; International Chamber of Commerce, *International Chamber of Commerce Mediation Rules 2014*, at preamble; International Centre for Dispute Resolution, *International Mediation Rules 2014*, at introduction.

Table 1. Comparison of Major Mediation Rules in China and UNCITRAL Conciliation Rules.

	CCPIT/CCIOC Mediation Rules (PRC)	HKIAC Mediation Rules (HK)	CCOIC-WTCM Conciliation Services Rules (Macao)	UNCITRAL Conciliation Rules
Commencement of mediation	arts 13-15: opt-in; 15 days to accept.	arts 3-4: opt in; 14 days to accept.	arts 9-11: opt-in; 30 days to accept.	art 2: opt-in; 30 days to accept.
Appointment of the mediator	arts 13(3), 14, 16, 17, 19: self-determination; centre can act as designating authority.	arts 3(a), 4-5: self-determination; centre can act as designating authority.	arts 9(3), 10, 12: self-determination; centre can act as designating authority <i>if parties agree to appoint a sole mediator.</i>	art 4: self-determination; appropriate institute can act as designating authority <i>if parties agree.</i>
Venue of mediation	art 24: at center, unless otherwise agreed.	N.A.	art 13: at center, unless otherwise agreed.	art 9(2): self-determination, <i>failing which mediator decides.</i>
Principles of mediation	arts 4-5, 28(4): voluntariness; self-determination as to outcome.	arts 1, 11(c): voluntariness; self-determination as to outcome.	arts 5-6, 17(3): voluntariness; self-determination as to outcome.	arts 2(2), 2(3), 7(1), 15(c), 15(d): voluntariness; self-determination as to outcome.

	CCPIT/CCIOC Mediation Rules (PRC)	HKIAC Mediation Rules (HK)	CCOIC-WTCM Conciliation Services Rules (Macao)	UNCITRAL Conciliation Rules
Role of the mediator	arts 5, 10, 21, 23 (and art 1 of Code of Conduct for Mediators): be <i>impartial, upright, knowledgeable and experienced</i> ; ensure a quality process including <i>offering settlement terms</i> ; mediate according to contract, law, international practice and principles of objectivity, justice and fairness, as well as on the basis of <i>ascertaining facts, distinguishing right from wrong, and determining liabilities</i> .	arts 6-8: be <i>disinterested</i> in outcome; ensure a quality process.	arts 6-7, 14, 18-19: be <i>impartial, upright, knowledgeable and experienced</i> ; ensure a quality process; mediate according to contract, law, international practice and principles of objectivity, justice and fairness, as well as on the basis of <i>ascertaining facts, distinguishing right from wrong, and determining liabilities</i> .	arts 5, 7, 9(1), 10: be <i>independent and impartial</i> ; ensure a quality process including <i>offering settlement terms</i> ; mediate according to principles of objectivity, justice and fairness, <i>rights and obligations of the parties</i> and usages of the trade.
Role of the parties	arts 23(e), 25, 30, 33: cooperate with mediator; consult relevant professionals; pay mediation and professional fees.	arts 9-10, 13: cooperate with mediator; consult relevant professionals; pay mediation and professional fees.	arts 15, 20, 23: cooperate with mediator; consult relevant professionals; pay mediation and professional fees.	arts 6, 8, 11, 12, 17: cooperate with mediator; consult relevant professionals; pay mediation and professional fees.

	CCPIT/CCIOC Mediation Rules (PRC)	HKIAC Mediation Rules (HK)	CCOIC-WTCM Conciliation Services Rules (Macao)	UNCITRAL Conciliation Rules
Non-disclosure of mediation communications	art 26: applies to <i>settlement agreement and statement prepared by the mediator based on settlement agreement</i> , except for implementation or enforcement.	N.A.	N.A.	arts 10, 14: applies in <i>separate sessions</i> ; applies to <i>all matters relating to mediation including settlement agreement</i> ; except for implementation or enforcement of settlement agreement.
Without prejudice privilege of mediation communications	art 31: applies to <i>settlement plans or proposals</i> put forward, proposed, admitted or indicated to be acceptable by the parties or the mediator; not to be used as <i>grounds for claim or defense</i> .	art 12(i): applies to every document, communication or information disclosed, made or produced by any party <i>for the purpose of or related to the mediation process, except for implementation or enforcement of settlement agreement; privileged and without prejudice</i> .	art 22: applies to <i>any statements, views, opinions or proposals</i> put forward, proposed, admitted or indicated to be acceptable by the parties or the mediator; not to be used as <i>grounds for claim or defense</i> .	art 20: applies to <i>views in respect of a possible settlement, admissions, mediator's settlement proposals and willingness to accept mediator's proposal</i> ; not to be <i>relied on or introduced as evidence</i> in subsequent proceedings.
Enforceability of settlement agreement	art 27: may include <i>arbitration clause</i> in settlement agreement.	N.A.	N.A.	art 13(2): may include <i>arbitration clause</i> in settlement agreement.

	CCPIT/CCIOC Mediation Rules (PRC)	HKIAC Mediation Rules (HK)	CCOIC-WTCM Conciliation Services Rules (Macao)	UNCITRAL Conciliation Rules
Role of the mediator in subsequent proceedings	arts 29, 32: not act as arbitrator or witness.	art 14: not act as <i>adjudicator</i> , arbitrator, <i>representative</i> , <i>counsel</i> or witness.	art 21: <i>may act as arbitrator.</i>	art 19: not act as arbitrator, <i>representative</i> , <i>counsel</i> or witness.

Table 2. Comparison of Mediation Law in China and UNCITRAL Model Law on International Commercial Conciliation.

	Civil Procedure Law (PRC)	Mediation Ordinance (HK)	UNCITRAL Model Law on International Commercial Conciliation
Commencement of mediation	N.A.	N.A.	art 4: opt-in; 30 days to accept.
Appointment of the mediator	arts 94-95: <i>people's court</i> appoints a judge or judicial panel and may enlist institutional help.	N.A.	art 5: self-determination; appropriate institute can act as designating authority <i>if parties agree</i> .
Venue of mediation	art 94 (and art 16 SPC Opinion 2009 [#]): <i>in people's court; outside of court if parties agree</i> .	s 5(1): at least partially in <i>Hong Kong</i> , as an element to trigger applicability of the legislation.	N.A.
Principles of mediation	art 9, 93, 96: voluntariness; self-determination as to outcome.	s 4(1): self-determination as to outcome.	arts 1(3), 4(1), 11(c) and 11(d): voluntariness; self-determination as to outcome.

	Civil Procedure Law (PRC)	Mediation Ordinance (HK)	UNCITRAL Model Law on International Commercial Conciliation
Role of the mediator	arts 9, 93, 97 (and arts 15-16, 19-20 SPC Opinion 2010*); be <i>impartial</i> ; ensure a quality process including <i>reality testing and drafting settlement terms</i> ; mediate according to <i>law, principles of objectivity, justice and fairness</i> , as well as <i>distinguishing between right and wrong</i> .	ss 2, 4(1): be <i>impartial</i> ; not adjudicate; ensure a quality process including <i>identifying issues, exploring and generating options and encouraging communications</i> .	arts 5(4), 6-8: be <i>independent and impartial</i> ; ensure a quality process including <i>offering settlement terms</i> .
Role of the parties	N.A.	N.A.	N.A.
Non-disclosure of mediation communications	N.A. But see art 19 SPC Opinion 2009#: applies to <i>information relating to mediation</i> .	arts 2, 8(1)-(3), 10(1): applies to <i>communication made for the purpose or in the course of mediation, except agreement to mediate and mediated settlement, unless with consent, in public domain, subject to discovery, for prevention of personal injury or serious harm, for research, evaluation</i>	arts 8-9: applies in <i>separate sessions</i> ; applies to <i>all matters relating to mediation</i> ; except for <i>implementation or enforcement of settlement agreement</i> .

	Civil Procedure Law (PRC)	Mediation Ordinance (HK)	UNCITRAL Model Law on International Commercial Conciliation
		<i>or education, for seeking legal advice, required by law, or with leave.</i>	
Without prejudice privilege of mediation communications	N.A. But see art 19 SPC Opinion 2009#: applies to <i>notes of the mediation proceedings, parties' concessions/promise s, mediator's/parties' views/proposals</i> ; not to be adduced as <i>evidence in related court proceedings</i> unless with consent, required by law or for protection of national, social or public interests or the legitimate rights and interests of a non-party in court proceedings.	arts 2, 9, 10(1): applies to <i>mediation communication</i> ; inadmissible in any <i>proceedings</i> unless with leave.	art 10: applies to <i>invitation/willingness to mediate, views in respect of a possible settlement, admissions, mediator's settlement proposals and willingness to accept mediator's proposal, documents prepared solely for mediation</i> ; not to be <i>relied on or introduced as evidence</i> in subsequent proceedings; <i>not admissible as evidence in subsequent proceedings</i> ; unless required by law or for implementation or enforcement of settlement agreement.

	Civil Procedure Law (PRC)	Mediation Ordinance (HK)	UNCITRAL Model Law on International Commercial Conciliation
Enforceability of settlement agreement	arts 234, 236 (and arts 20-25 SPC Opinion 2009 [#]): <i>apply to the court</i> for enforcement (for judicially mediated settlement); apply to the court for <i>validation</i> and enforcement (for settlement agreements reached at other organisations).	N.A.	art 14: <i>binding and enforceable</i> ; up to States to impose enforcement mechanism.
Role of the mediator in subsequent proceedings	N.A. But see art 19 SPC Opinion 2009 [#] : not to act as <i>witness</i> .	N.A.	arts 10(1), (3), (4), 12: not <i>give testimony unless required by law or for implementation or enforcement of settlement agreement</i> ; not act as <i>arbitrator</i> unless agreed by parties.
	[#] SPC Opinion 2009 stands for Several Opinions of the Supreme People's Court on Establishing a Sound Conflict and Dispute Resolution Mechanism that		

	Civil Procedure Law (PRC)	Mediation Ordinance (HK)	UNCITRAL Model Law on International Commercial Conciliation
	<p>Connects Litigation and Non-litigation 2009.</p> <p>* SPC Opinion 2010 refers to Several Opinions of the Supreme People's Court on Further Implementing the Work Principle of 'Giving Priority to Mediation and Combining Mediation with Judgment' 2010.</p>		

A Case Management

A mechanism to trigger the commencement of mediation is of utmost importance, since disputants generally name a service provider and refer to its process rules only in their contract.⁵⁰ The Chinese opt-in procedure is consistent

50 For example, model conciliation clause of UNCITRAL Conciliation Rules 1980: 'Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force'; suggested mediation clause of Hong Kong International Arbitration Centre: 'Any dispute or difference arising out of or in connection with this contract shall first be referred to mediation at Hong Kong International Arbitration Centre (HKIAC) and in accordance with its then current Mediation Rules. If the mediation is abandoned by the mediator or is otherwise concluded without the dispute or difference being resolved, then such dispute or difference shall be referred to and determined by arbitration at HKIAC and in accordance with its Domestic Arbitration Rules' and recommended clause for domestic and international conciliation of the World Trade Center Macau: 'Any dispute, controversy or claim arising out of or relating to this contract, shall be settled by conciliation in Macao S.A.R. at

with article 2 of the Conciliation Rules and article 4 of the Model Law. Both UNCITRAL texts make it clear that mediation commences only if disputants agree to engage in the process within 30 days or any other specified period. The requesting party may revoke the invitation to mediate before its acceptance, as a corollary of the principle of voluntary withdrawal.⁵¹ However, the responding party's option to refuse to mediate would defeat the purpose of any contractual agreement entered into before or after the dispute has arisen to engage in mediation. Whilst the sources of an obligation to mediate and consequences of non-compliance may depend on private contracts and national policies,⁵² the UNCITRAL texts should not abstain from addressing this issue which is fundamental to achieving the objective of encouraging greater use of mediation and further subject to the parties' right to withdraw in the course of the process. Amendment is called for to the effect that acceptance is no longer required where disputants concluded an agreement to mediate. Mediation will commence when the initiating party's request reaches the named service provider and/or the responding party. Acceptance is necessary only in case of no pre-existing agreement. The ICC, ICDR and WIPO contributed to harmonization in this aspect in their respective mediation rules.⁵³

Appointing the mediator and fixing the mediation venue are crucial for the process to begin. Article 4 of the Conciliation Rules and article 5 of the Model Law encourage disputants to agree on the selection of the mediator, but require prior authorization from the parties before their named service provider can make a default appointment. The UNCITRAL can follow up in two directions. First, it could empower the parties' decision-making by requiring them to strike out unacceptable names on the recommendation list and priorities the remaining names in order of preference within a limited timeframe before a default appointment

World Trade Center Macau Arbitration Center and in accordance with its Internal Regulations. If the said dispute, controversy or claim could not be resolved by conciliation, with the parties' will, it can be settled through the arbitration process'.

51 Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation 2002 para 44.

52 *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, (United Nations Publication Sales No. E.05.V.4, New York 2004) at para 36, 43, 76.

53 International Chamber of Commerce, *Mediation Rules 201*, at arts 2(1), (3), (5), 3(1), (3), (4); The International Centre for Dispute Resolution, *International Mediation Rules 2014*, at art 2; the WIPO Arbitration and Mediation Center, *WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules and Clauses 2014* at arts 2-4.

kicks in.⁵⁴ Secondly, it could remove the condition for default appointment of mediators. Appropriate service providers should be able to come to the rescue where the parties reach no consensus on the choice of the mediator.⁵⁵ As to the place of mediation, the Model Law makes no mention of it, on the basis that an international commercial mediation can occur in several places in practice and hence it may appear somewhat artificial to designate the place of mediation as the primary basis for triggering the application of domestic legislation on mediation.⁵⁶ Hong Kong's Mediation Ordinance offers a solution to resolve this issue. It applies where, firstly, there is a written agreement to mediate and, secondly, either a mediation takes place at least partially in the city or the governing law clause in the written mediation agreement refers to the laws of Hong Kong or the Mediation Ordinance.⁵⁷ Even if the UNCITRAL rejects this approach, the mediator's determination of the mediation venue after consultation with the parties as provided in article 9(2) of the Conciliation Rules has its place in the Model Law, which is consistent with the general principles to promote active involvement and autonomy of the parties.

B Functions of the Mediator and the Parties

The neutral character of the mediator has different shades of meaning. Apart from being impartial and having no interest as to the outcome of the process, article 7(1) of the Conciliation Rules and article 5(4) of the Model Law require the mediator to be independent. It is time for the UNCITRAL texts to formally recognise and clearly define these three distinct concepts of neutrality. Impartiality means freedom from favoritism, bias or prejudice.⁵⁸ Impartial mediators conduct the process fairly and even-handedly as between parties.⁵⁹ Disinterested mediators

54 The International Centre for Dispute Resolution, International Mediation Rules 2014, at art 4(b).

55 CPIT/CCOIC Mediation Rules 2005 (People's Republic of China), art 19(b); HKIAC Mediation Rules 1999 (Hong Kong), art 5.

56 *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, (United Nations Publication Sales No. E.05.V.4, New York 2004) at para 30.

57 CAP 620 Mediation Ordinance 2013 (Hong Kong) s 5(1).

58 American Arbitration Association, *American Bar Association and Association for Conflict Resolution*, 'Model Standards of Conduct for Mediators 2005' at Standard II.

59 Model Law on International Commercial Conciliation 2002, above n 1, at art 6(3); *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, above n 56, at para 55; *Code of Practice for Civil and Commercial Mediation 2011*, Law Society

do not have any significant personal or financial interest in the outcome of mediation.⁶⁰ Independent mediators have no prior relationship with the parties and no allegiance to outside bodies interested in the result of mediation. Incidental to the principle of neutrality, article 5(5) of the Model Law imposes a duty on the mediator to disclose all actual and potential conflicts of interest that may raise a question about the mediator's neutrality. It extends the duty to disclose throughout the mediation proceedings. The UNCITRAL could also deal with conflict situations arisen subsequent to the process, such as the establishment of personal or professional relationship with the parties, other individuals or organizations involved in mediation.⁶¹ Further, articles 7(4) and 13(1) of the Conciliation Rules and article 6(4) of the Model Law permit the mediator to offer settlement proposals in the course of the process. Even if all parties agree that they would like the mediator to do so, there is a substantial risk in taking a proactive approach to settlement that the mediator may no longer appear to be impartial and disinterested as to outcome. A better course would be to empower the mediator to promote the settlement of the issues in dispute in any manner that he or she believes to be appropriate,⁶² while clarifying that the mediator cannot make a binding decision for⁶³ or impose a settlement upon the parties.⁶⁴

On the other hand, the role of the parties is relatively unequivocal. Their right to engage in mediation voluntarily, terminate the process if they wish, and make free and informed decisions as to the outcome of the dispute find strong resonance in articles 2(2), 2(3), 7(1), 15(c) and 15(d) of the Conciliation Rules and articles 1(3), 4(1), 11(c) and 11(d) of the Model Law. Their responsibilities to cooperate with the

of England and Wales, s 3.2.2; *The Hong Kong Mediation Code*, Working Group on Mediation of the Department of Justice of the Government of the Hong Kong Special Administrative Region, at arts 1 and 2.

60 *Code of Practice for Civil and Commercial Mediation*, at s 3.2.1; *The Hong Kong Mediation Code*, Working Group on Mediation of the Department of Justice of the Government of the Hong Kong Special Administrative Region, 'The Hong Kong Mediation Code', at art 1.

61 *Model Standards of Conduct for Mediator*, American Arbitration Association, American Bar Association and Association for Conflict Resolution 2005, Standard III(A), (E), (F).

62 *WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules and Clauses*, above n53, at art 13(a).

63 ICDR International Mediation Rules, above n 54, at introduction.

64 *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendment as Adopted* in 2006, A/61/453, at art 1(3); *WIPO Mediation Rules*, above n 53, art 13(a).

mediator and seek professional assistance are provided likewise in articles 6, 8, 11, 12 and 17 of the Conciliation Rules.

C Post-Mediation Issues

The protection for confidentiality of mediation communications varies in three respects. Firstly, the subject matter may refer to all communications made for the purpose of or in the course of mediation, or a particular communication. Secondly, the duty may rest on the mediator and/or mediation participants. Thirdly, the prohibited use may include non-disclosure, without prejudice and/or inadmissibility as evidence in subsequent proceedings. The UNCITRAL texts provide the most comprehensive coverage. Article 10 of the Conciliation Rules and article 8 of the Model Law address the scenarios where a party gives information to the mediator subject to a specific condition that it be kept confidential. In those circumstances, the mediator has a duty not to disclose that information to any other party to the process. Article 14 of the Conciliation Rules and article 9 of the Model Law extend the scope of non-disclosure to all mediation-related information. That is to say, information disclosed during mediation, the substance and the result of the process, as well as matters relating to mediation that occurred before the agreement to mediate was reached.⁶⁵ Article 10 of the Model Law preserves the without prejudice nature of all information disclosed, made or produced for the purpose of or related to mediation, unless required under the law or for the purpose of implementation or enforcement of a settlement agreement.⁶⁶ The scope of the without prejudice rule is sufficiently broad to cover the non-exhaustive list of mediation-related information including: invitation to mediate, willingness to mediate, admissions, views and suggestions of settlement proposals, willingness to settle and documents prepared solely for mediation.⁶⁷ The without prejudice rule applies in all subsequent proceedings, whether related or unrelated to the subject

65 United Nations, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002*, (United Nations Publication Sales No. E.05.V.4, New York 2004), at para 61.

66 Above note 65, at art 10(1), (3); c.f. Conciliation Rules 1980 art 20; ICDR International Mediation Rules 2014, above n 54, art 10(3); WIPO Mediation Rules 2014, above n53, at art 17.

67 *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendment as Adopted* in 2006, above n 64, at art 10(1); Conciliation Rules 1980 art 20; ICDR International Mediation Rules 2014, above n 54, at art 10(3); WIPO Mediation Rules 2014, above n 62, art 17.

matter of mediation.⁶⁸ The mediator, the parties and any third person have an obligation not to rely on, introduce as evidence or testify as to all mediation-related information.⁶⁹ In addition, the court is required to treat such evidence inadmissible.⁷⁰

The neutral role of the mediator in subsequent proceedings is too important to ignore. Article 19 of the Conciliation Rules requires an undertaking from the parties and the mediator that the latter will not act as an arbitrator or representative, counsel or witness of any party in any subsequent arbitration or judicial proceedings in respect of a dispute that is the subject matter of mediation. The Model Law presents further refinements. Article 10(1), (3) and (4) prohibits the mediator from giving testimony in any subsequent proceedings, whether or not they are related to the dispute that is the subject matter of mediation. Article 12 prevents the mediator from arbitrating disputes that arise from the same contract or legal relationship or any related contract or legal relationship.

Finally, as a matter of general policy, the UNCITRAL promotes easy and fast enforcement of mediated settlement agreements.⁷¹ However, article 14 of the Model Law only creates a contractual obligation binding on the parties to such settlement agreements and enforceable by State courts. It is up to the States to adopt expedited enforcement mechanism or simplified procedures. Existing legislative solutions to this issue differ widely.⁷² Apart from relying on the contract law and invoking court enforcement, the law in other jurisdictions empower mediation parties to appoint an arbitral tribunal for the specific purpose of issuing

68 *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendment as Adopted* in 2006, above n 64, at art 10(4); Conciliation Rules 1980 art 20; ICDR International Mediation Rules 2014, above n 54, at art 10(3); WIPO Mediation Rules 2014, above n 62, art 17.

69 *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendment as Adopted* in 2006, above n 64, at art 20; Conciliation Rules 1980 art 20; ICDR International Mediation Rules 2014, above n 54, at art 10(3); WIPO Mediation Rules 2014, above n 62, art 17.

70 *UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendment as Adopted* in 2006, above n 64, at art 10(3); Conciliation Rules 1980 art 20; ICDR International Mediation Rules 2014, above n 54, at art 10(3); WIPO Mediation Rules 2014, above n 62, art 17.

71 Nations, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use* 2002, above n3, at para 88.

72 *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation - Note by the Secretariat*, A/CN.9/WG.II/WP.187 (2014), at para 20.

an award on agreed terms based on the settlement agreement, or transpose a mediated settlement in the form of a notarial deed for enforcement of a specific court order.⁷³ In February 2015, the Working Group on Arbitration and Conciliation considered some legal and practical issues that could arise from a convention on enforcement of mediated settlement agreements and assessed the feasibility of preparing such an international instrument.⁷⁴ Its recommendation to the UNCITRAL to request a broad mandate on this topic to take into account various approaches and concerns, identify relevant issues and develop possible solutions is encouraging,⁷⁵ as mediated settlements are perceived to be more difficult to enforce than arbitral awards and enforcement under contract law in other jurisdictions can be burdensome and time-consuming.⁷⁶

73 At paras 26-27.

74 *Report of Working Group II (Arbitration and Conciliation) on the Work of Its Sixty-Second Session*, A/CN.9/832, (2015), at paras 17-56.

75 At para 59.

76 *Settlement of Commercial Disputes: Enforceability of Settlement Agreements Resulting from International Commercial Conciliation/Mediation* - Note by the Secretariat, above n72, para 2.